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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

SALLY A. SMELSER,

Defendant-Appellant.

NO. 38420

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF JEROME

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District Judge

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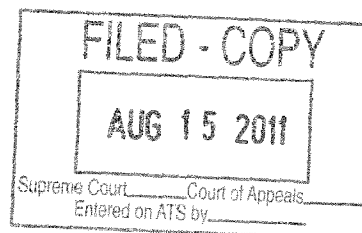


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STATEMENT OF THE CASE

Nature Of The Case

Sally Smelser appeals from the judgment entered upon the jury verdict finding her guilty of misdemeanor driving under the influence. On appeal Smelser claims the district court, acting in its appellate capacity, erred in (1) declining to review the magistrate's denial of her motion to dismiss; (2) finding the evidence was sufficient to support her conviction; and (3) denying her request for a new trial based on the prosecutor's closing argument.

Statement Of Facts And Course Of Proceedings

On March 28, 2009, at approximately 5:50 a.m. in Twin Falls, Idaho, Deputy Jason Summers was on patrol when he noticed "taillights off the roadway out in the weeds." (Tr., p.133, Ls.14-25.) As Deputy Summers approached to investigate, he also "saw heavy black marks at a diagonal crossing the highway . . . coming from the median and which led to the area where the[] taillights were." (Tr., p.134, Ls.5-7.) Deputy Summers "activated [the] lights on [his] vehicle and stopped the vehicle to make contact with the driver." (Tr., p.134, Ls.10-11.) The driver, later identified as Smelser, said she had fallen asleep driving home from work. (Tr., p.137, Ls.15-24; p.140, Ls.11-18.) Smelser worked in Wendell, Idaho, where she was a first grade school teacher. (Tr., p.137, Ls.23-24; p.140, Ls.5-7.) Smelser testified that she had decided to work all night because she had recently been placed on probation and needed to catch up on her work. (Tr., p.267, Ls.20-25; p.268, Ls.13-16; see also Tr., p.138, Ls.1-8.)

Upon making contact with Smelser, Deputy Summers noticed she seemed confused and was delayed in her responses. (Tr., p.138, Ls.13-14, 22-25.) Smelser was also “shuffling around the front of her vehicle while sitting there,” “messing with stuff in the vehicle,” and mumbling about “school problems” and the fact that she was on probation. (Tr., p.139, Ls.4-12.) Deputy Summers asked Smelser for her license, registration, and proof of insurance. (Tr., p.140, Ls.24-25.) After a period of time, Smelser provided her debit card rather than her driver’s license. (Tr., p.141, Ls.8-11, 15-18.) Oddly, Smelser searched through what “appeared to be” children’s “homework or schoolwork” on her passenger seat when looking for her registration and insurance. (Tr., p.142, Ls.6-9.) After about ten minutes, Smelser finally provided Deputy Summers with her proof of insurance, which was located on the visor. (Tr., p.142, Ls.13-14; p.282, Ls.13-16.) Smelser continued to talk about “off the wall things” while looking for the items Deputy Summers requested. (Tr., p.142, Ls.15-21.)

Concerned about Smelser’s behavior and the possibility that she may be driving under the influence, Deputy Summers asked Smelser if she was on any medications. (Tr., p.142, L.24 – p.143, L.25.) Smelser stated she was taking Klonopin, which she described as a muscle relaxer, as well as Lyrica “for nerves.” (Tr., p.145, Ls.4-5; p.148, Ls.16-17.) At that point, Deputy Summers asked Smelser to perform field sobriety tests. (Tr., p.145, Ls.13-14.) Smelser failed all three field sobriety tests. (Tr., p.148, Ls.6-8; p.150, L.24 – p.154, L.16.) Deputy Summers also noticed Smelser’s pupils were dilated, indicating that “something’s in her system.” (Tr., p.146, Ls.20-25.)

As a result of Smelser's behavior, her inability to successfully complete the field sobriety tests, and her admission to taking certain prescription medications, Deputy Summers told Smelser he was placing her under arrest for driving under the influence.¹ (Tr., p.154, Ls.18-20.) Smelser initially said, "no, you're not," but was ultimately cooperative. (Tr., p.154, Ls.22-24.) Deputy Summers transported Smelser to the jail. During that time, Smelser again said she had taken Klonopin and Lyrica before leaving Wendell and that she had also taken Concerta for attention deficit disorder. (Tr., p.156, L.23 – p.157, L.5.)

Deputy Summers conducted a breathalyzer test, which was negative. (Tr., p.167, L.23 – p.168, L.2.) After that, Deputy Summers requested the assistance of a drug recognition expert, but one never responded. (Tr., p.167, Ls.2-25.) Deputy Summers then transported Smelser to the hospital in order to obtain a urine sample for drug testing. (Tr., p.169, Ls.14-20.) Smelser's urine sample tested positive for Methylphenodate and Venlafaxine. (Tr., p.234, L.22 – p.235, L.1.) Susan Williamson, the forensic scientist who performed Smelser's urinalysis, testified Methylphenodate is a "stimulatory type drug" used to treat narcolepsy and attention deficit disorder (Tr., p.235, Ls.4-7), and Venlafaxine is an anti-depressant (Tr., p.235, Ls.11-13). She also testified that Klonopin and Lyrica are not the same as Methylphenodate or Venlafaxine. (Tr., p.236, Ls.19-23.) Further, Ms. Williamson testified that her lab can detect Klonopin but only if

¹¹ Deputy Summers also cited Smelser for possession of a controlled substance without a prescription because he found a "clear plastic container" in Smelser's purse "with no identification on it" that had several different pills in it. (Tr., p.156, Ls.6-12; R., p.11.) The state later moved to dismiss the possession charge and Smelser proceeded to trial on the driving under the influence charge. (R., pp.141, 145.)

there is a "significant amount there." (Tr., p.237, Ls.1-4.) Ms. Williamson's lab cannot, however, test for Lyrica because it "is such a new pharmaceutical." (Tr., p.237, Ls.5-7.)

Prior to trial, Smelser filed a motion to dismiss because the hearing officer in Smelser's related license suspension case concluded "all of the requirements for suspension of [Smelser's] driving privileges set forth in Idaho Code §§18-8002 and 18-8002A were not complied with in this case." (R., p.59.) This conclusion appeared to be based solely on Deputy Summers' report. (R., pp.62-63.) After conducting a hearing on Smelser's motion to dismiss, at which both Deputy Summers and Ms. Williamson testified, the magistrate denied Smelser's motion and the case proceeded to trial. (R., pp.176-192.)

The jury found Smelser guilty of driving under the influence (R., p.320), after which she filed a motion for judgment of acquittal based upon the prosecutor's alleged misstatement of the state's burden of proof (R., pp.322-323). The court imposed a 180-day jail sentence, with 178 days suspended and placed Smelser on probation. (R., pp.334, 337.) Smelser timely appealed to the district court. (R., pp.338-340.)

Smelser raised three issues² on appeal: (1) whether the magistrate erred in denying her motion to dismiss; (2) "[w]hether the jury verdict was supported by substantial and competent evidence where no drug recognition expert

² Smelser purported to raise a fourth issue, which she stated as follows: "Whether the additional issues should be raised on appeal?" (R., p.371.) Smelser did not, however, submit any argument or authority in support of this "issue" and it is unclear precisely what the district court was supposed to decide in relation to this "issue." (R., pp.370-372.)

participated in the arrest or trial;" and (3) whether she is entitled to a new trial "due to prosecutorial misconduct where the prosecutor stated to the jury that the standard was more reasonable then [sic] not." (R., p.371.) The district court denied relief, concluding (1) the magistrate's denial of Smelser's motion to dismiss was not reviewable; (2) "the jury verdict was supported by substantial and competent evidence;" and (3) any error by the prosecutor in closing argument was "adequately corrected during the trial" and was, therefore, harmless. (R., pp.469-477.) Smelser filed a timely notice of appeal from the district court's Memorandum Decision on Appeal. (R., pp.479-481.)

ISSUES

Smelser states the issues on appeal as:

1. The District Court erred by denying review of the Motion to Dismiss.
2. The District Court's Determination that the jury verdict was supported by substantial and competent evidence is error.
3. The District Court erred in determining the prosecutorial misconduct at trial was harmless.

(Appellant's Brief, p.4 (capitalization original).)

The state rephrases the issues on appeal as:

1. Because Smelser has failed to support her claim of error in relation to the district court's review of the magistrate's order denying her motion to dismiss with argument and authority, should this Court decline to consider it? Alternatively, has Smelser failed to establish any error in the manner in which the district court addressed her claim that the magistrate erred in denying her motion to dismiss?
2. Was there substantial competent evidence admitted at trial from which the jury found beyond a reasonable doubt that Smelser was guilty of driving under the influence?
3. Has Smelser failed to establish the prosecutor committed misconduct in closing argument, much less that the prosecutor's comments rose to the level of fundamental error?

ARGUMENT

I.

Smelser's Claim That The District Court Erred By Denying Review Of The Magistrate's Denial Of Her Motion To Dismiss Is Waived In Light Of Her Failure To Support The Claim With Argument Or Authority; Alternatively, Smelser Has Failed To Establish Any Error In The Manner In Which The District Court Addressed The Claim

A. Introduction

Smelser filed a motion to dismiss prior to trial, claiming her criminal case should be dismissed because the hearing officer in her related license suspension case concluded "all of the requirements for suspension of [Smelser's] driving privileges set forth in Idaho Code §§ 18-8002 and 18-8002A were not complied with in this case." (R., p.59.) The magistrate denied the motion. (R., pp.176-192, 197-198.) On appeal to the district court, Smelser asserted the magistrate erred, claiming the lack of a drug recognition expert required dismissal of her case. (R., p.371.) The district court, characterizing Smelser's request for dismissal as a claim based on insufficient evidence to establish probable cause, declined to address the merits of the magistrate's ruling in light of the fact that Smelser had been convicted following a trial. (R., p.471.) On appeal, Smelser claims the district court erred in "denying review of the motion to dismiss." (Appellant's Brief, p.4 (capitalization altered).) Smelser has waived this claim because she has failed to support it with argument and authority. Alternatively, Smelser has failed to show any error in the manner in which the district court addressed her claim that the magistrate erred in denying her motion to dismiss.

B. Smelser Has Waived Her Claim That The District Court Erred In Denying Review Of The Magistrate's Order Denying Her Motion To Dismiss

Smelser claims the district court erred in "denying review of the motion to dismiss." (Appellant's Brief, p.4.) In support of this "claim," Smelser notes that she filed the motion and the grounds for the motion. (Appellant's Brief, p.4.)

Smelser's entire argument in support of this "claim" reads:

Through her Motion to Dismiss Ms. Smelser in effect was asking the Magistrate Court to follow a sister court's findings, the Idaho Department of Transportation Administrative License Suspension division, and also find that all of the requirements for suspension of Ms. Smelser's driving privileges set forth in Idaho Code §§ 18-8002 and 18-8002A were not complied with in this case and pursuant to that deficiency in the technical requirements also dismiss the criminal charges.

(Appellant's Brief, p.5.)

Nowhere in her "argument" does Smelser explain how the district court resolved her appellate claim of error in relation to the magistrate's denial of her motion to dismiss, much less explain why the district court's resolution was erroneous. Nor does Smelser cite any legal authority in support of her "claim" of error. Because Smelser has essentially presented no cogent claim to which the state can respond, her first "claim" is waived and this Court should decline to consider it. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.").

C. Even If This Court Considers Smelser's Assertion That The District Court Erred By Denying Review Of Her Claim That The Magistrate Erred In Denying Her Motion To Dismiss, She Has Failed To Establish Error

Even if this Court considers Smelser's assertion that the district court erred by "denying review of the motion to dismiss," Smelser has failed to show the district court erred in the manner in which it addressed this claim. (Appellant's Brief, p.4 (capitalization altered).)

The magistrate court, characterizing Smelser's motion to dismiss as one based upon a lack of evidence or probable cause to support a driving under the influence charge, denied her motion concluding there was sufficient evidence presented, even absent a drug recognition expert, to support a finding that Smelser's "driving ability was affected or impaired by the taking of the prescriptions admitted to in this case." (R., p.191.) The case, therefore, proceeded to trial after which a jury found Smelser guilty.

On appeal to the district court, Smelser sought to revisit the magistrate's pre-trial ruling regarding the sufficiency of the evidence. (R., p.371.) The district court declined to consider the magistrate's ruling on the pre-trial motion to dismiss citing the well-established legal principle that any defects in the probable cause determination will not be reviewed on appeal "where the defendant has been found guilty following a fair trial on the merits." (R., p.471 (quoting State v. Sibley, 138 Idaho 259, 262, 61 P.3d 616, 619 (Ct. App. 2002).) While Smelser seems to disagree with the magistrate's ruling on the merits of her motion to dismiss and believes the district court should have considered the merits as well, she does not explain why the legal principle applied by the district court was

erroneous. This Court should affirm the district court's decision on the unchallenged and correct basis that a defendant is not entitled to appellate review of a pre-trial ruling regarding the sufficiency of the evidence to proceed to trial. See, e.g., State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where a basis for a trial court's ruling is not challenged on appeal, an appellate court will affirm on the unchallenged basis).

II.

There Was Substantial Competent Evidence Admitted At Trial From Which The Jury Found Smelser Guilty Of Driving Under The Influence

A. Introduction

Smelser challenges her conviction for misdemeanor driving under the influence, arguing the state failed to present sufficient evidence to prove beyond a reasonable doubt that her "driving was impaired by Clonopin [sic] or Lyrica." (Appellant's Brief, p.5.) More specifically, Smelser claims the evidence was insufficient "because the lab could not test for" Lyrica or Klonopin. (Appellant's Brief, p.5.) Smelser's claim fails because it is not preserved. Even if this Court considers the merits of Smelser's argument, a review of the record shows the state presented substantial competent evidence to prove beyond a reasonable doubt that Smelser was driving under the influence.

B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App.

2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The appellate court “examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings.” Id. “If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, [the appellate court] affirm[s] the district court's decision as a matter of procedure.” Id. (citing Losser, 145 Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. Miller, 131 Idaho at 292, 955 P.2d at 607; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. Miller, 131 Idaho at 292, 955 P.2d at 607; Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. The State Presented Sufficient Evidence To Prove The Essential Elements Of Driving Under The Influence

The state charged Smelser with misdemeanor driving under the influence. (R., p.11.) Smelser claims on appeal that the state failed to present sufficient evidence of the charge “because the lab could not test for” Lyrica or Klonopin. (Appellant’s Brief, p.5.) Smelser’s claim fails because, although she raised a sufficiency of the evidence claim on appeal to the district court, that claim was based entirely upon her assertion that “the State’s failure to obtain and present Drug Recognition Expert (DRE) testimony is fatal to the State’s case.” (R., p.371.) Smelser’s current assertion based upon the lab’s inability to test for Lyrica or Klonopin is a different claim and should not be considered.³ See, e.g., Wood v. Wood, 124 Idaho 12, 855 P.2d 473 (Ct. App. 1993); Centers v. Yehezkely, 109 Idaho 216, 706 P.2d 105 (Ct. App. 1985).

Even if the Court considers the merits of Smelser’s sufficiency of the evidence claim, she has failed to meet her burden of showing error because the state was not required to present positive lab results in order to prove Smelser was driving under the influence of drugs she admitted taking.

The jury was instructed that in order to find Smelser guilty of driving under the influence, the state was required to prove, beyond a reasonable doubt that, on the date in question, Smelser (1) “[w]as in actual physical control, or driving a

³ Although Smelser also argues on this appeal that “a Drug Recognition Evaluator (DRE) qualified law enforcement officer . . . would have provided the best proof in her case,” she does not argue, as she did before the district court, that the state is required to utilize a drug recognition expert in order to present sufficient evidence of driving under the influence of drugs. (Appellant’s Brief, p.5; compare R., p.371.)

motor vehicle;" (2) "[o]n a highway, street or bridge or on public or private property open to public use;" and (3) "[w]hile under the influence of a combination of alcohol or drugs or an intoxicating substance." (R., p.304.) Smelser challenges only the final element, claiming she could not be convicted absent proof from the laboratory that Lyrica and Klonopin were, in fact, in her urine. This claim is contrary to law.

There are two ways the state may prove the crime of driving under the influence: (1) "by showing under a totality of the evidence that a defendant was driving under the influence," which "encompass[es] circumstantial evidence of impaired driving ability or other observable symptoms of intoxication;" or (2) by evidence that the defendant drove with a blood alcohol level exceeding the legal limit. State v. Barker, 123 Idaho 162, 845 P.2d 580 (Ct. App. 1992) (citation and quotations omitted). In this case, the state proceeded under the first method of proof as Smelser's breathalyzer test was negative and the state's theory of the case was that Smelser was under the influence of prescription medications that impaired her ability to drive. The state presented substantial and competent evidence to support this theory in the form of Deputy Summers' testimony regarding Smelser's driving, her behavior generally, and her performance on the field sobriety tests, and the forensic scientist's testimony regarding the side effects of the drugs Smelser admitted taking. Specifically, Ms. Williamson testified that the side effects of Klonopin, which are "dose related, can include dizziness and confusion and drowsiness." (Tr., p.239, Ls.11-13.) Ms. Williamson also testified a person taking Klonopin can experience "blurred vision" and lack of

coordination. (Tr., p.239, Ls.13-14.) Similarly, the side effects of Lyrica include “sleepiness and dizziness.” (Tr., p.239, L.23 – p.240, L.4.) In fact, the package insert for Lyrica advises those who take it “that they should not drive,” “operate machinery or engage in any sort of dangerous activities until they appreciate how this particular drug affects them,” *i.e.*, how “their visual, [] mental and motor skills are affected by the drug.” (Tr., p.240, Ls.4-13.) Both Klonopin and Lyrica act as “central nervous system depressant[s],” that, when taken together and while someone is tired, would have an “additive effect.” (Tr., p.239, Ls.18-20; p.240, Ls.17-25, p.241, Ls.17-18.) Ms. Williamson’s testimony, coupled with Deputy Summers’ testimony, was sufficient to prove, beyond a reasonable doubt, that Smelser was guilty of driving under the influence. See Barker, 123 Idaho at 164, 845 P.2d at 582 (driving under the influence statute “allows prosecution for use of drugs other than alcohol if other competent evidence is available”).

As explained in State v. Lesley, 133 Idaho 23, 26, 981 P.2d 748, 751 (Ct. App. 1999), “Idaho Code § 18-8004 does not require that a driver have a certain quantity of drugs in his or her system in order to be guilty of driving under the influence.” Rather, “[a] violation [of the statute] turns upon the effect that the drugs or combination of drugs and alcohol have on the individual’s ability to safely operate a vehicle, not upon any quantification of the amount of a drug in the bloodstream.” Id.; see also I.C. § 18-8004(1)(a) (making it unlawful to operate a motor vehicle “under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances”); § 18-8004(3) (“If the results of the test requested by a

police officer show a person's alcohol concentration of less than 0.08, . . . , such fact may be considered with other competent evidence of drug use other than alcohol in determining the guilt or innocence of the defendant.").

To the extent Smelser is claiming the evidence was insufficient based on her explanations for her poor performance on the field sobriety tests, this claim is without merit. For example, Smelser references her "lazy eye," claims her driving was the result of her fatigue, and notes "Deputy Summers was questioned about his cruiser's headlights and overhead lights reflecting on [her] during the Field Sobriety Tests." (Appellant's Brief, pp.5-6 (capitalization original).) Deputy Summers, however, explained he did not see Smelser's "lazy eye" despite her claim that she has one (Tr., p.146, Ls.11-19), and he denied his lights interfered with Smelser's ability to perform the nystagmus test (Tr., p.362, Ls.18-25). In any event, the jury clearly rejected Smelser's explanations, as it was entitled to do. See Lesley, 133 Idaho at 27, 981 P.2d at 752 ("Lesley offered alternative reasons for the findings made by the drug recognition expert, including explanations for some of her problems in the field sobriety tests and other potential causes for the physical manifestations noted by the expert. The jury, however, did not accept Lesley's characterization of the events and test results. It is for the jury, and not this appellate court, to decide such issues of credibility.").

Smelser has failed to establish the evidence was insufficient to support her conviction for misdemeanor driving under the influence.

III.

Smelser Has Failed To Establish The Prosecutor Committed Misconduct In Closing Argument, Much Less That The Prosecutor's Challenged Remarks Rise To The Level Of Fundamental Error

A. Introduction

Smelser argues that the prosecutor committed misconduct rising to the level of fundamental error “requiring a mistrial”⁴ by misstating the state’s burden of proof in closing argument. (Appellant’s Brief, p.6.) Application of the correct standard of review to the facts reveals Smelser’s claim fails. Although the prosecutor did, at one point, characterize the burden of proof as “more reasonable . . . than not,” she later explained what she meant by this comment and referenced the correct standard of proof. Smelser has failed to show the district court erred in concluding the prosecutor’s closing argument does not entitle him to a new trial.

B. Standard Of Review

“Generally Idaho’s appellate courts will not consider error not preserved for appeal through an objection at trial.” State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 976 (2010) (citations omitted). Where a claim is raised for the first time on appeal, the appellate court will consider whether the error alleged qualifies as fundamental error. Id. at 980.

⁴ In addition to incorrectly referring to her remedy as declaration of a “mistrial,” Smelser erroneously asserts “Justice Huntley’s dissent in *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (Idaho, 1986) sets forth the analysis for prosecutorial misconduct that is not objected to.” (Appellant’s Brief, p.7.) As discussed *infra*, the proper fundamental error analysis is that recently articulated by the Idaho Supreme Court in State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010).

C. Smelser Has Failed To Establish Reversible Error In Relation To The Prosecutor's Closing Argument

Smelser contends the prosecutor engaged in misconduct during closing argument by misstating the state's burden of proof and concedes that she did not object to the state's argument at trial. (Appellant's Brief, pp.6-7.) Under the Idaho Supreme Court's recent opinion in Perry, unobjected to claims of constitutional error are reviewed using a three-part test:

(1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated, (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights meaning (in most instances) that it must have affected the outcome of the trial proceedings.

150 Idaho at ___, 245 P.3d 978.

Application of the foregoing standard to Smelser's claim of error demonstrates she has failed to meet her burden of establishing she is entitled to reversal of her conviction.

In closing argument, the prosecutor, in describing reasonable doubt, stated: "You get to use your reasoning in this and say, based on the facts that I see here today, I believe it is more reasonable that she committed this crime than not." (Tr., p.383, Ls.7-9.) Smelser did not object at that time, but instead argued the following during her closing:

One glaring thing that stands out among some others is the prosecutor's characterization of reasonable doubt, which is a mischaracterization of reasonable doubt. She argued to you that you decide what seems more reasonable, that's what you decide

here, that's not the standard, that's a standard in a civil case. That's more probable than not, that is in no way, shape or form the standard in a criminal case.

The standard in a criminal case is beyond a reasonable doubt. The only standard that is close to that, which is somewhat higher, is the civil standard of clear and convincing evidence, which is used in fraud cases. More likely than not, more reasonable than not, that's 51%. Beyond a reasonable doubt is a lot higher than that. Where it hits exactly, I can't tell you, but it sure as heck isn't more probable than not and it sure as heck isn't, do you think – do you think she probably drove while under the influence? Do you think she probably drove impaired? Well, yeah, I guess she probably did, that's not the standard.

The standard is, are you convinced to a moral certainty that all of the elements of this offense, each and every element – each and every element, including the impairment element, you look at each one separately, has been proven beyond a reasonable doubt to a moral certainty. . . .

The standard is reasonable doubt. If you were – the way I like to phrase it is if you were making a decision about an important thing in your life, . . . , the time and the thought you would put into that. . . . It's the thought and the time that you give to an important – to the most important decisions in your life.

. . . [D]on't be misled into believing that you just have to find enough evidence to convict. Because that's not the standard and it just has to be more likely than not that she was impaired because that is an absolute mischaracterization of the law and [sic] the state of Idaho.

(Tr., p.405, L.14 – p.407, L.14.)

Acknowledging the possibility of confusion in relation to her argument, the prosecutor stated in rebuttal:

Ladies and gentlemen, we heard the defense counsel refer to Deputy Summers as Deputy Smelser, I think some of you may have – thought that was entertaining.

As you can see when we're up here, we do, sometimes, get our informations [sic] mixed up. That's why you don't listen – or take what we say as evidence and testimony on the stand, that is a

prime reason. And I'm also making this statement because I didn't say probable cause, or more probable than not, I used the word more reasonable than not and I can see where that may raise some confusion.

Defense counsel is definitely correct in his reiteration of reasonable doubt and what that is. What I was intending to say is that what is the opposite of reasonable doubt? You have a reasonable belief. Your reasonable belief has to go beyond that doubt. So that [sic] – that is what we're asking you to do today, the moral turpitude, all that [sic] jury instructions that the court has given you, if that helps you, then that's the standard. But the opposite of reasonable doubt is reasonable belief.

(Tr., p.414, L.11 – p.415, L.4.)

The Court of Appeals has concluded that “[m]isconduct may occur by the prosecutor diminishing or distorting the State's burden to prove the defendant's guilt beyond a reasonable doubt.” State v. Erickson, 148 Idaho 679, 685, 227 P.3d 933, 939 (Ct. App. 2010) (citations omitted). While Smelser interpreted the state's argument as diminishing the state's burden of proof, the prosecutor explained her comments were intended to explain the opposite of reasonable doubt. While perhaps inartful, the prosecutor's comments did not rise to the level of a due process violation. Compare Darden v. Wainwright, 477 U.S. 168, 180-181 (1986) (“[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned,” rather “[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”); Donnelly v. DeChristoforo, 416 U.S. 637, 646-647 (1974) (“[C]losing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general provisions in

no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.”).

Because the prosecutor’s comments regarding the applicable burden of proof did not rise to the level of a due process violation, Smelser’s claim fails under the first prong of Perry since her comments did not result in a constitutional violation.

Even if the prosecutor’s comments regarding the meaning of reasonable doubt are sufficient to overcome the first step in the Perry analysis, Smelser has not met her burden of overcoming the second or third steps in the analysis – nor has she even tried. With respect to the second step in the analysis, the record would belie any claim that the failure to object was anything but a tactical decision. Counsel for Smelser was clearly aware of what he perceived as an erroneous explanation of the state’s burden of proof and rather than objecting, as he did elsewhere during the prosecutor’s closing argument (Tr., p.386, Ls.16-17; p.390, Ls.5-6), he elected to hammer the prosecutor during his closing argument, accusing her of mischaracterizing the state’s burden (Tr., p.405, L.14 – p.407, L.14). Thus, Smelser could not meet her burden of satisfying the second prong of Perry even if she had tried.

Finally, with respect to the third prong, Smelser has failed to establish any error affected her substantial rights. Not only did the prosecutor clarify what she meant by her comments regarding the reasonable doubt standard and agree with

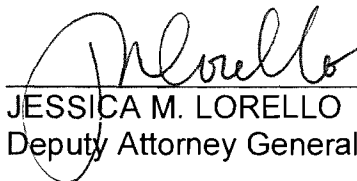
Smelser's "reiteration of reasonable doubt and what it is" (Tr., p.414, Ls.11-22), the court correctly instructed the jury on the definition of reasonable doubt (R., p.279) and advised the jury that, in order to find Smelser guilty, the state was required to prove all elements "beyond a reasonable doubt" (R., p.304). The district court correctly concluded the "error was adequately corrected during the trial" and the outcome would not "have been different absent th[e] error." (R., p.476.)

Because Smelser has failed to satisfy her burden of establishing error in relation to the prosecutor's closing arguments, much less fundamental error, she is not entitled to relief on her misconduct claim.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon Smelser's conviction for driving under the influence.

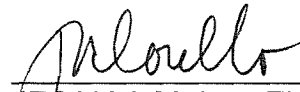
DATED this 15th day of August, 2011.


JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of August 2011, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JOSEPH R. ROCKSTAHL
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JML/pm

